Tetuan Sulaiman & Taye v Wong Poh Kun & Anor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(NCC)(W)-980–08 OF 2020 AND W-02(NCC)(W)-982–08 OF 2020

LEE SWEE SENG, HADHARIAH SYED ISMAIL AND GUNALAN MUNIANDY JJCA

7 FEBRUARY 2023

Companies and Corporations — Directors — Fraudulent trading — Appellants alleged respondents dissipated company's assets fraudulently to deny appellants from recovering their debt — High Court ordered respondents jointly and severally to pay sum to liquidator as contribution to assets of company — Whether there was intent to defraud creditors of company by respondent — Whether High Court erred in applying s 304(1) of Companies Act 1965 — Companies Act 1965 s 304(1)

These two appeals ('Appeal 980' and 'Appeal 982') were heard together against the decision of the learned judicial commissioner ('LJC'). The respondents were the former directors of a company known as Bistari Land Sdn Bhd ('BL'). Appeal 980 was an appeal by the appellant while Appeal 982 was an appeal by the respondents against the whole decision of the LJC. Both the respondents ie Wong Poh Kun ('WPK') and Wong Poh Lum ('WPL') were mandatory signatories to the bank accounts of BL. The appellant was engaged by BL to render legal services in respect of various litigations involving certain pieces of land belonging to BL. For the legal services rendered, the appellant issued a bill for its services to BL for an amount of RM5,907,500. As no payment was received from BL, the appellant initiated a civil suit against BL to recover the sum due ('Suit 288') in which the appellant entered judgment in appearance against BL ('judgment in default'). BL filed a petition against the appellant seeking to tax the bill and also applied to set aside the judgment in default. Subsequently, the appellant and BL agreed for the bill to be taxed and by consent, the judgment in default was set aside and Suit 288 was withdrawn. In the taxation proceedings of the bill, the appellant had then applied for a mandatory injunction against BL to earmark/hold the sum of RM6m until the disposal of the taxation as they were aware that BL had entered into a sale and purchase transaction of its only asset with Mah Seng Group, and would come into the final payment of the transaction sometime on or before 30 September 2015. The second respondent affirmed an affidavit to state that BL would not dissipate its assets (the proceeds of sale) to avoid paying the appellant and would satisfy all its debts, and had also stated that BL was solvent at all material times. However, before the petition was heard on its merits, BL had been wound up on 29 January 2016 by the Government of Malaysia ('GOM'). With

the winding up of BL, BL then did not proceed with its application to tax the appellant's bill, with the then application for taxation being struck out. The appellant was not told that a winding up petition had been filed against BL by the GOM. Thus, the appellant filed an action against the respondents alleging, inter alia, that the respondents had dissipated the proceeds of sale under the sale and purchase agreement. The appellant claimed that the respondents had knowingly and intentionally carried on the business of BL to defraud the appellant while continuing with the proceedings under the petition and were liable to the appellant under s 304(1) of the Companies Act 1965 ('the CA 1965'). The respondents denied that they were in any way personally liable to the appellant for the bill which was rendered to BL and owed by BL to the appellant. The LJC ordered that both the respondents jointly and severally to pay the sum of RM5,907,500 and the sum owed to the GOM to the liquidator of BL as contribution to the assets of the company. Hence, these appeals.

Held:

(1) Reference must be made to the wording of s 304(1) of the CA 1965 and s 540(1) of the Companies Act 2016 ('the CA 2016'), which did not stipulate that the acts of fraudulent trading in question could only occur during the winding up proceedings of the company. The fact that BL had received the sum of RM71,310,616.46 prior to being wound up which WPL admitted, which was more than enough to satisfy any creditor was a crucial fact to which the LJC had rightly given due consideration as it was clear evidence to support WPL's alleged intent to defraud BL's creditors. WPL's pleaded defence that he was merely following his co-director's instruction was untenable considering amongst others, that he was a mandatory co-signatory of BL. There was no error in the LJC's finding that WPL was knowingly a party to the carrying out of the dissipation of the monies, and that to be knowing by a party to the fraud, the person did not have to know every detail of the fraud or how it was to be perpetrated. The plaintiff was entitled to draw an adverse inference from WPL's inability to provide any explanation as a mandatory cheque signatory of BL on how the money received was dealt with. The LJC was correct in finding that having established that the monies were dissipated during WPL's control and management of BL, the plaintiff had satisfied its burden of proof, and the onus shifted to WPL to show that the monies were not dissipated wrongly, to support his defence as such, it was rightly found that it was WPL who should have called the liquidator as a witness if he took the position that the liquidator was in possession of the material documents on the dissipation of the monies. The LJC's finding of fact on the core issue of intention to defraud creditors of the company was supported by the evidence and facts adverted to in the LJC's

reasoning. Thus, the finding was clearly not shown to be incorrect, much less, plainly wrong to warrant any interference or variation by the court (see paras 39–42 & 44).

(2) The LJC had erred in principle in ordering that the monies be paid out to the liquidator of BL as contribution to the assets of the company. It was erroneous for the LJC to have held that English decision on the interpretation of s 332(1) of the United Kingdom Companies Act 1948 were still relevant and useful in the consideration of s 304(1) of the CA 1965. An unsecured creditor ie the appellant was entitled to obtain an order or judgment against directors personally pursuant to s 304 of CA 1965. The LJC fell into error as to the classification of creditors. The circumstance of the case indeed called for personal liability against WPL as the director contrary to the finding of the LJC. As the appellant's pleaded case was also purely concerned with the appellant's own claims, it was not an action whereby the appellant was seeking to make WPK and WPL to be liable for any and/or all creditors' claims, including that of the GOM against BL. Considering the appellant's pleaded cause of action, it was misconceived for the LJC to secure the payment for the GOM, a non-party to the action in disregard of the facts and principles in respect of the said cause of action under s 304(1) of the CA 1965 or s 540 of the CA 2016. Both s 304 of the CA 1965 and s 540 of the CA 2016 did not limit the right of any creditor to initiate action against the persons responsible for the fraudulent trading, it therefore must not have been Parliament's intention to provide such a limitation (see paras 47, 52, 54, 56–57 & 60).

(3) On Appeal 982, there was more than ample evidence to support the High Court's findings that the directors of the company had carried on business to defraud creditors. However, as the Inland Revenue Department ('IRD') was not a party to the suit, the High Court had erred into venturing into the Inland Revenue's debt when IRD was not a plaintiff or a party before the court. Therefore, Appeal 982 was allowed in part and the High Court's decision relating to the IRD's debt was set aside. As regards to Appeal 980, the proper order should be an order for the payment of the legal fees of RM5,907,500 and interest as claimed direct to the appellant by the respondents jointly and severally. Such a payment would not offend the priority of payment principle as the action was brought against the delinquent directors personally and not against the wound up company. Therefore, Appeal 980 was allowed (see para 61).

[Bahasa Malaysia summary

Kedua-dua rayuan ini ('Rayuan 980' dan 'Rayuan 982') didengar bersama terhadap keputusan pesuruhjaya kehakiman yang bijaksana ('PK'). Responden adalah bekas pengarah sebuah syarikat yang dikenali sebagai Bistari Land Sdn

A Bhd ('BL'). Rayuan 980 adalah rayuan oleh perayu manakala Rayuan 982 adalah rayuan oleh responden terhadap keseluruhan keputusan PK. Kedua-dua responden iaitu Wong Poh Kun ('WPK') dan Wong Poh Lum ('WPL') adalah penandatangan mandatori kepada akaun bank BL. Perayu telah dilantik oleh BL untuk memberikan khidmat guaman berkenaan dengan
B pelbagai litigasi yang melibatkan beberapa tanah tertentu milik BL. Bagi perkhidmatan guaman yang diberikan, perayu mengeluarkan bil untuk perkhidmatannya kepada BL berjumlah RM5,907,500. Oleh kerana tiada bayaran diterima daripada BL, perayu telah memulakan saman sivil terhadap
C BL untuk mendapatkan semula jumlah yang perlu dibayar ('Saman 288') di mana perayu memasukkan penghakiman kehadiran terhadap BL ('penghakiman ingkar'). BL memfailkan petisyen terhadap perayu memohon untuk penetapan bil dan juga memohon untuk mengetepikan penghakiman ingkar tersebut. Selepas itu, perayu dan BL bersetuju untuk penetapan bil dan
D dengan persetujuan, penghakiman ingkar telah diketepikan dan Saman 288 telah ditarik balik. Dalam prosiding penetapan bil itu, perayu kemudiannya telah memohon injunksi mandatori terhadap BL untuk memperuntukkan/memegang jumlah RM6 juta sehingga pelupusan penetapan kerana mereka menyedari bahawa BL telah membuat transaksi jual
E beli satu-satunya aset dengan Kumpulan Mah Seng, dan akan menerima pembayaran terakhir transaksi itu pada atau sebelum 30 September 2015. Responden kedua mengesahkan afidavit untuk menyatakan bahawa BL tidak akan melupuskan asetnya (hasil jualan) untuk mengelak daripada membayar perayu dan akan membayar semua hutangnya, dan juga telah menyatakan
F bahawa BL adalah solven pada setiap masa material. Walau bagaimanapun, sebelum petisyen didengar atas meritnya, BL telah digulung pada 29 Januari 2016 oleh Kerajaan Malaysia ('KM'). Dengan penggulungan BL, BL kemudiannya tidak meneruskan permohonannya untuk penetapan bil perayu, dengan permohonan penetapan pada masa itu dibatalkan. Perayu tidak
G diberitahu bahawa petisyen penggulungan telah difailkan terhadap BL oleh KM. Oleh itu, perayu memfailkan tindakan terhadap responden dengan mendakwa, antara lain, bahawa responden telah melupuskan hasil jualan di bawah perjanjian jual beli. Perayu mendakwa bahawa responden telah secara sedar dan sengaja menjalankan perniagaan BL untuk menipu perayu semasa
H meneruskan prosiding di bawah petisyen dan bertanggungjawab kepada perayu di bawah s 304(1) Akta Syarikat 1965 ('AS 1965'). Responden menafikan bahawa mereka dalam apa-apa cara secara peribadi bertanggungjawab kepada perayu untuk bil yang telah diberikan kepada BL dan terhutang oleh BL kepada perayu. PK memerintahkan kedua-dua
I responden secara bersama dan berasingan membayar jumlah RM5,907,500 dan jumlah terhutang kepada KM kepada penyelesai BL sebagai sumbangan kepada aset syarikat. Oleh itu, rayuan ini.

Diputuskan:

(1) Rujukan mesti dibuat kepada perkataan s 304(1) AS 1965 dan s 540(1) Akta Syarikat 2016 ('AS 2016'), yang tidak menetapkan bahawa tindakan penipuan dagangan yang dipersoalkan hanya boleh berlaku semasa prosiding penggulungan syarikat. Hakikat bahawa BL telah menerima jumlah RM71,310,616.46 sebelum digulung yang diakui WPL, yang lebih daripada cukup untuk memenuhi mana-mana pemiutang adalah fakta penting yang PK telah memberi pertimbangan sewajarnya kerana ia adalah bukti yang jelas untuk menyokong niat WPL yang didakwa untuk menipu pemiutang BL. Pembelaan WPL bahawa dia hanya mengikut arahan pengarah bersamanya tidak dapat dipertahankan memandangkan antara lain, bahawa dia adalah penandatangan wajib bersama BL. Tiada kesilapan dalam penemuan PK bahawa WPL secara sedar adalah pihak yang melaksanakan pelupusan wang itu, dan bahawa untuk mengetahui oleh pihak yang melakukan penipuan, orang itu tidak perlu mengetahui setiap butiran penipuan atau bagaimana ia dilakukan. Plaintif berhak membuat anggapan bertentangan daripada ketidakupayaan WPL untuk memberikan sebarang penjelasan sebagai penandatangan cek mandatori BL tentang cara wang yang diterima diuruskan. PK adalah betul dalam mendapati bahawa setelah menetapkan bahawa wang telah dilupuskan semasa kawalan dan pengurusan WPL terhadap BL, plaintif telah memenuhi beban pembuktiannya, dan tanggungjawab beralih kepada WPL untuk menunjukkan bahawa wang itu tidak dilupuskan secara salah, untuk menyokong pembelaannya, adalah wajar didapati bahawa WPL yang sepatutnya memanggil penyelesai sebagai saksi jika dia mengambil pendirian bahawa penyelesai memiliki dokumen penting mengenai pelupusan wang tersebut. Penemuan fakta PK mengenai isu teras niat untuk menipu pemiutang syarikat disokong oleh bukti dan fakta yang dirujuk dalam alasan PK. Oleh itu, penemuan itu jelas tidak ditunjukkan sebagai tidak betul, lebih-lebih lagi, jelas salah untuk menjamin sebarang gangguan atau perubahan oleh mahkamah (lihat perenggan 39–42 & 44).

(2) PK telah terkhilaf pada dasarnya dalam memerintahkan supaya wang itu dibayar kepada penyelesai BL sebagai sumbangan kepada aset syarikat. Adalah salah bagi PK apabila memutuskan bahawa keputusan Inggeris mengenai tafsiran s 332(1) Akta Syarikat 1948 United Kingdom masih relevan dan berguna dalam pertimbangan s 304(1) AS 1965. Pemiutang tidak bercagar iaitu perayu berhak untuk mendapatkan perintah atau penghakiman terhadap pengarah secara peribadi menurut s 304 AS 1965. PK terkhilaf mengenai klasifikasi pemiutang. Keadaan kes itu sememangnya memerlukan liabiliti peribadi terhadap WPL sebagai pengarah bertentangan dengan dapatan PK. Memandangkan kes yang diplidkan perayu juga semata-mata berkenaan dengan tuntutan perayu sendiri, ia bukanlah satu tindakan di mana perayu ingin menjadikan

WPK dan WPL bertanggungjawab bagi mana-mana dan/atau semua tuntutan pemiutang, termasuk KM menentang BL. Mempertimbangkan kausa tindakan yang diplidkan perayu, adalah salah anggap bagi PK untuk mendapatkan bayaran untuk GOM, bukan pihak dalam tindakan itu dengan tidak mengambil kira fakta dan prinsip berkenaan dengan kausa tindakan tersebut di bawah s 304(1) AS 1965 atau s 540 AS 2016. Kedua-dua s 304 AS 1965 dan s 540 AS 2016 tidak mengehadkan hak mana-mana pemiutang untuk memulakan tindakan terhadap orang yang bertanggungjawab ke atas penipuan dagangan itu, oleh itu ia tidak boleh telah menjadi niat Parlimen untuk memberikan had sedemikian (lihat perenggan 47, 52, 54, 56–57 & 60).

(3) Mengenai Rayuan 982, terdapat lebih daripada keterangan yang mencukupi untuk menyokong penemuan Mahkamah Tinggi bahawa pengarah syarikat telah menjalankan perniagaan untuk menipu pemiutang. Walau bagaimanapun, memandangkan Jabatan Hasil Dalam Negeri ('IRD') bukan pihak dalam saman itu, Mahkamah Tinggi telah terkhilaf memasukkan hutang Hasil Dalam Negeri apabila IRD bukan plaintif atau pihak di hadapan mahkamah. Oleh itu, Rayuan 982 dibenarkan sebahagiannya dan keputusan Mahkamah Tinggi berkaitan hutang IRD telah diketepikan. Berkenaan dengan Rayuan 980, perintah yang sepatutnya adalah perintah untuk pembayaran yuran guaman sebanyak RM5,907,500 dan faedah seperti yang dituntut terus kepada perayu oleh responden secara bersama dan berasingan. Pembayaran sedemikian tidak akan melanggar keutamaan prinsip pembayaran kerana tindakan itu telah dikenakan terhadap pengarah yang bermasalah secara peribadi dan bukan terhadap syarikat yang digulung. Oleh itu, Rayuan 980 dibenarkan (lihat perenggan 61).]

Cases referred to

Chin Chee Keong v Toling Corp (M) Sdn Bhd [2016] 3 MLJ 479; [2016] 6 CLJ 666, CA (refd)

Cyona Distributors Ltd, Re [1967] 2 WLR 369, CA (refd)

Dato' Prem Krishna Sahgal v Muniandy a/l Nadasan & Ors [2018] 2 MLJ 693; [2017] 10 CLJ 385, FC (refd)

Esal (Commodities) Ltd, Re, London and Overseas (Sugar) Co Ltd and another v Punjab National Bank [1997] BCLC 705, CA (refd)

Huatah Sdn Bhd v Yap Chee Kian & Ors [2020] 8 MLJ 98; [2020] 2 CLJ 560, HC (folld)

JCT Ltd v Muniandy Nadasan & Ors and another appeal [2016] 6 MLJ 635; [2016] 3 CLJ 692, CA (folld)

Kuthubul Zaman Bukhari & Anor v Tsai Su Chu & Ors [2013] 9 CLJ 524, HC (refd)

LMW Electronics Pte Ltd v Ang Chuang Juay & Ors [2010] 1 MLJ 185; [2010] 4 CLJ 849, HC (refd)

Tradewinds Properties Sdn Bhd v Zulhkiple bin A Bakar & Ors [2019] 1 MLJ 421; [2019] 2 CLJ 261, CA (refd)
William C Leitch Bros, Ltd (No 2), Re [1932] All ER Rep 897, Ch D (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) ss 218, 304, 304(1)
Companies Act 2016 ss 528, 540, 540(1)
Companies Act 1948 [UK] s 332, 332(1)
Evidence Act 1950 s 106
Insolvency Act 1986 [UK] s 213

Appeal from: *Tetuan Sulaiman & Taye v Wong Poh Kun & Anor* [2021] 8 MLJ 550 (High Court, Kuala Lumpur)

Lee Tat Yew (with Premman Gopal) (Omar Ismail Hazman & Co) for the appellant.
Hafizah Johor bt Ariff Johor (Malaysian Department of Insolvency) for the first respondent.
Ng Li Kien (Ng, Gan & Partners) for the second respondent.

Gunalan Muniandy JCA:

INTRODUCTION

[1] These are two appeals which were heard together against the decision of the learned judicial commissioner ('LJC') of the Kuala Lumpur High Court ('KLHC') made after a full trial of the suit before the LJC. The first appeal is against the order holding the defendants jointly and severally liable to pay the sum of RM5,907,500 and the sum due to the Government of Malaysia under the judgment dated 5 May 2010 to the liquidator of the company as contribution to the assets of the company.

BACKGROUND FACTS

[2] The defendants are brothers and were the former directors of a company known as Bistari Land Sdn Bhd ('BL'). Both the defendants were mandatory signatories to the bank accounts of BL.

[3] Sometime in 2010, the plaintiff was engaged by BL to render legal services in respect of various litigations involving certain pieces of land belonging to BL.

[4] For the legal services rendered, sometime on 2 July 2014, the plaintiff issued a bill for its services to the BL for an amount of RM5,907,500.

[5] As no payment was received from BL, the plaintiff initiated a civil suit against BL under Kuala Lumpur High Court Suit No 22NCC-288–08 of 2014 in August 2014 to recover the sum due thereunder ('Suit 288').

[6] On 12 September 2014, the plaintiff entered judgment in default of appearance against BL in Suit 288 ('judgment in default').

[7] In December 2014, BL filed a petition against the plaintiff seeking to tax the bill. At about the same time, BL Land applied to set aside the judgment in default.

[8] Subsequently, the plaintiff and BL agreed for the bill to be taxed and by consent, the judgment in default was set aside and Suit 288 was withdrawn on 7 July 2015.

[9] In the said taxation proceedings of the bill, the plaintiff had on or about August 2015 then applied for a mandatory injunction against BL Land to earmark/hold the sum of RM6m until the disposal of the taxation. The plaintiff made such an application as they were aware that BL had entered into a sale and purchase transaction of its only asset (lands in Johor) with Mah Seng Group, and will come into the final payment of the said transaction sometime on or before 30 September 2015. The second defendant, as director of BL, then affirmed an affidavit to state that BL Land would not dissipate its assets (the proceeds of sale) to avoid paying the plaintiff and will satisfy all its debts, and had also stated that BL was solvent at all material times.

[10] However, before the petition was heard on its merits, BL's solicitors wrote to the court to inform that BL had been wound up on 29 January 2016 by the Government of Malaysia.

[11] With the winding up of BL, BL then did not proceed with its application to tax the plaintiff's bill, with the then application for taxation being struck out. The plaintiff subsequently filed its proof of debt against BL, which has been received and admitted by the Insolvency Department.

[12] BL had not informed the court or the plaintiff in Suit 288 or in the petition that the Government of Malaysia had obtained a summary judgment against BL on 5 May 2010 for the sum of RM4,042,272.28 ('the summary judgment') in Suit No S5–21–64 of 2008 ('Suit 21') and that the Government of Malaysia had served BL with a statutory demand dated 21 April 2015 for the sum of RM5,651,663.48 as at 20 April 2015 under the then s 218 of the Companies Act 1965 pursuant to the summary judgment. The plaintiff was also not told that a winding up petition had been filed against the company on 26 October 2015 by the Government of Malaysia.

[13] By reason of the aforesaid, the plaintiff filed an action against the defendants alleging that:

(a) BL had sold the lands under the SPA for the sum of RM429,868,897.92 on 1 October 2013;

(b) although the proceeds of sale under the SPA of the lands had been paid, the defendants had failed to procure BL to pay the Bill to the plaintiff;

(c) instead, the defendants filed the petition and did not disclose to the plaintiff and or the court of the summary judgment, the statutory demand and or that the winding up petition had been filed against BL;

(d) the defendants had dissipated the proceeds of sale under the SPA. in particular, the plaintiff alleged that a sum of RM4,999,991 that was transferred into BL's account on 18 June 2014 by the conveyancing stakeholder, was transferred out to the first respondent's personal account the following day on 19 June 2014. After receiving the sum of approximately RM70m being the balance of the proceeds of sale under the SPA for the lands, the defendants had failed to utilise the same to pay the plaintiff and the Government of Malaysia and instead had acted to deprive them of the debts and had dissipated the proceeds to themselves; and

(e) by reasons of the aforesaid, the plaintiff claimed that the defendants had knowingly and intentionally carried on the business of BL to defraud the plaintiff while continuing with the proceedings under the petition and are liable to the plaintiff under s 304(1) of the CA 1965.

[14] The defendants denied that they are in any way personally liable to the plaintiff for the bill which was rendered to BL and owed by BL to the plaintiff.

[15] The defendants denied that the transfer of RM4,922,008 to the first defendant's personal account on 19 June 2014 was to defraud the plaintiff as BL was only issued with the Bill sometime on 2 July 2014. It is illogical that the defendants had transferred the monies to avoid the payment of the bill when the bill had not even been issued at the time of the transfer.

[16] The first defendant was adjudged a bankrupt on 15 October 2019. Leave to proceed with this action against the first defendant was obtained by the plaintiff from the Bankruptcy Court on 3 February 2020. He was not represented at the trial.

[17] The LJC ordered that both the defendants jointly and severally to pay the sum of RM5,907,500 and the sum owed to the Government of Malaysia to the liquidator of BL as contribution to the assets of the company.

A OUR DECISION

[18] We would, first and foremost, note that the judgment of the LJC (as he then was) dealt with s 304 of the Companies Act 1965 ('the CA 1965') which is now s 540 of the Companies Act 2016 ('the CA 2016'). As explained by the LJC, in particular, he deliberated upon the core issue as to whether directors of a company who are mandatory signatories to the company's bank accounts but are unable to provide any satisfactory explanation as to how monies received from the disposal of the company's sole asset were expended or dealt with, thus, causing the company to become unable to pay its debts to its creditors causing it to be subsequently wound up, can be said to have carried on the business of the company with the intent to defraud its creditors or for fraudulent purpose.

[19] A consequential issue that also called for the LJC's determination was whether the delinquent directors who are ordered to assume personal liability of the debts of the company under s 304(1) of the CA 1965 should make the payment directly to the applicant under the section or to pay the sums into the assets of the company to be distributed *pari passu* to all general creditors in a case where the company has been wound up.

[20] We must also at the outset have in mind the essence of the plaintiff/appellant's case against the defendants ('D1 and D2') in the court below which was for both of them to be made personally liable for carrying on the business of the company with the intention to defraud the creditors of the company or creditors of any other person or for any fraudulent purpose (as the directors in charge and/or managing the affairs finances and management of Bistari Land at that material time that it was wound up), based upon s 540 of the CA 2016.

[21] The determination of Appeal 980 centred around the narrow question as to whether the LJC had erred in applying s 304(1) of the CA 1965 when he ordered that the monies were to be paid to the Liquidator of BL as contribution to the assets of the company.

[22] As regards Appeal 982, it is an appeal by the defendants ('WPK' and 'WPL') against the whole decision of the LJC.

[23] Based on the LJC's grounds of judgment ('GOJ') the appellant in Appeal 980 ('M/S Sulaiman & Taye') highlighted to us that the LJC had found both WPK and WPL liable based on the fact that WPL had both confirmed and admitted the fact that Bistari Land ('BL') had received RM71,310,616.46, which was also admittedly more than sufficient to settle all debts due to BL's creditors at that time, but have nevertheless allowed BL to fall into liquidation, with nary an explanation as to what happened to the sums received by BL.

What was more damning, it was emphasized, was WPL's feigned ignorance as to what happened to the monies received, when WPL was a mandatory co-signatory of BL's accounts.

[24] For convenience, we reproduce s 304(1) of the Companies Act 1965 (of which s 540(1) of the CA 2016 is a verbatim adoption of s 304(1) which states:

> If in course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court on the application of the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.

[25] We are in agreement with the High Court in *Huatah Sdn Bhd v Yap Chee Kian & Ors* [2020] 8 MLJ 98; [2020] 2 CLJ 560 that in actions against directors for fraudulent trading, the elements that must be proved are:

(a) the business of the company has been carried out with intent to defraud creditors, or for any fraudulent purpose; and

(b) the defendants were knowingly parties to the company's carrying on of the business in that manner with intent to defraud creditors or for any fraudulent purpose.

[26] As to whether there was intent to defraud or to carry out any fraudulent purpose is a question of fact to be inferred from the surrounding circumstances and the subsequent conduct of the defendants, especially the concealment of material facts (see *LMW Electronics Pte Ltd v Ang Chuang Juay & Ors* [2010] 1 MLJ 185; [2010] 4 CLJ 849).

[27] In order to prove intention to defraud, there is no necessity for evidence of a scheme to defraud the company's creditors as a single act of carrying on the company's business to defraud its creditors would suffice to trigger fraudulent trading (see *JCT Ltd v Muniandy Nadasan & Ors and another appeal* [2016] 6 MLJ 635; [2016] 3 CLJ 692).

[28] Intention by the defendants to defraud the creditors of the company can be inferred from the fact that the company did not have a profit-generating business at the material time but yet placed unusually large orders without explaining how they were going to honour the company's obligations (see *Chin Chee Keong v Toling Corp (M) Sdn Bhd* [2016] 3 MLJ 479; [2016] 6 CLJ 666). A similar inference may be made when the defendants dissipate the company's assets when the company was not facing or facing any dire financial hardship

(see *Kuthubul Zaman Bukhari & Anor v Tsai Su Chu & Ors* [2013] 9 CLJ 524).

[29] A case in point that both parties referred to in support of their respective contentions was that in the Court of Appeal decision of *Tradewinds Properties Sdn Bhd v Zulhkiple bin A Bakar & Ors* [2019] 1 MLJ 421; [2019] 2 CLJ 261, where it was held that there was an intention to defraud when the first defendant (director of the second and third defendants) passed resolutions to reassign the second defendant's future earnings to the third defendant, resulting in the second defendant becoming a dormant company with no assets and therefore unable to pay its judgment debts to the plaintiff.

[30] The appellant in Appeal 980 submitted that the LJC, consistent with the above decision had made a correct finding based on the present factual scenario, that the case against WPL pursuant to s 304(1) of the CA 1965 has been made out and accordingly, WPL was jointly and severally made liable with just cause and reason.

[31] R2 in Appeal 980 ('WPL') on the contrary contended that *Tradewinds* could be distinguished from the present case as the COA decision in that case was premised on there being clear and strong evidence (coupled with admissions by the defendants) to show a clear intention of the defendants attempting to defraud the plaintiff by depriving it from receiving the sums as agreed in the CJ. The third defendant was clearly a fraud instrument incorporated only on 4 September 2009 by the first defendant after Suit 93 was commenced on 16 February 2009, and prior to the CJ (consent judgment).

[32] However, in the instant case, R2 submitted that the plaintiff did not have any clear and/or strong evidence to show a clear intention of the second defendant having attempted to defraud the plaintiff by depriving it from receiving the sums of RM5,907,500 from Bistari Land ('BL'). Here, the plaintiff was said to be only relying on the fact that a sum of RM4,922,008 was transferred from BL's account to the first defendant's account on 19 June 2014 as basis to accuse the second defendant of fraud. On the purported dissipation of money, the plaintiff was said to have only documents regarding the transfer of the above sum. R2's position was that the issue here is only whether the sum of RM4,922,008 was transferred to avoid payment of RM5,907,500 by BL to the plaintiff.

[33] We would at this point take note of the defendants' pleaded case which is, inter alia, as summarised by R2 as follows:

(a) Bistari Land ('BL') never owed plaintiff any legal fee of RM5,907,500. The bill itself was not valid as it was grossly excessive and subject to taxation;

(b) there was no valid and/or good reason why the defendants as former directors should be personally liable for any BL's purported debt;

(c) the plaintiff's claim was merely an abuse of court process and only commenced by the plaintiff against the defendants because BL had been wound up and the plaintiff could no longer claim the sum of RM5,907,500 from BL; and

(d) any fraud and wrongdoing alleged by the plaintiff is denied and the plaintiff is put to strict proof.

[34] In support of R2 ('D2')'s contention that the plaintiff's claim against ('D2') had no basis and ought not to have been allowed by the LJC, R2 highlighted to us these salient facts.

(a) the transfer from BL's account to R1 ('D1')'s account was done on 19 June 2014, ie about a month before the bill of costs was even issued to BL as evidenced by the relevant Alliance bank statement; and

(b) the plaintiff's bill was dated 2 July 2014.

[35] Therefore it was submitted that the plaintiff's allegation that the transfer was made to avoid the plaintiff's bill was, inter alia, totally misconceived, untrue and/or devoid of any merits.

[36] In essence, what R2 impressed upon us is that as at the date of the transfer on 19 June 2014 there was no debt due and/or obligation on the part of BL to pay the plaintiff. Hence, as at that date, the plaintiff could not even be regarded as a creditor or prospective creditor within the meaning of s 304 of the CA. Besides, at the time the transfer was made on 19 June 2014, there was no proceedings commenced against BL by the plaintiff for the bill of RM5,907,500. As such, it followed that should not be held liable under s 304 of the CA.

[37] Primarily, the question that arose for our deliberation was whether the fraudulent intent by R2 to defraud the creditors of BL was carried out in the process of winding up the company or in any proceeding against the company was the restrictive approach taken by R2 that s 304 of the CA only applies if the transfer or the so called 'dissipation' was made 'in the course of proceedings' against BL for the sum of RM5,907,500 which was commenced by the plaintiff vide Suit 288 only sometime in August 2014.

[38] When the suit was commenced, some two months had lapsed since the date of the transfer. R2, therefore, submitted that s 304(1) of the CA should not have been invoked against R2 as a former director of BL for him to be held

personally liable to the plaintiff for the dissipation of BL's assets causing it to be wound-up.

[39] As to R2's point that as the alleged fraudulent trading did not occur during the W/U proceedings, any intention to defraud has not been proved. We accept the appellant M/S Sulaiman & Taye ('ST's') proposition that reference must be made to the wording of s 304(1) of the 1965 Act and s 540(1) of the 2016 Act, which does not stipulate that the acts of fraudulent trading in question can only occur during the W/U proceedings of the company.

[40] In finding intent to defraud, among the factors that the LJC took into account was that BL had received the sum of RM71,310,616.46 prior to being wound up which WPL ('R2') admitted, which was more than enough to satisfy any creditor. Despite such amounts being received, both WPK and WPL allowed BL to fall into liquidation, with no explanation as to where the proceeds had gone to. Our view is that this was a crucial fact to which the LJC, had rightly given due consideration as it was clear evidence to support WPL's alleged intent to defraud BL's creditors. To our minds too WPL's pleaded defence that he was merely following his co-director (brother)'s instruction was untenable considering amongst others, that he was a mandatory co-signatory of BL. There was no error in the LJC's finding that, at the very least, WPL was knowingly a party to the carrying out of the dissipation of the monies, and that to be knowing by a party to the fraud, the person does not have to know every detail of the fraud or how it is to be perpetrated. Merely turning a 'blind-eye' to the fraud being perpetrated would suffice to implicate him and hold him liable to the company's creditors.

[41] We are also in agreement with the LJC's view that the plaintiff is entitled to draw an adverse inference from WPL's inability to provide any explanation as a mandatory cheque signatory of BL on how the money received was dealt with. Further, WPL's refusal and or inability to provide any explanation is a conscious withholding or suppression of evidence as he was in a position to provide such information, being the mandatory cheque signatory of the account; and that the monies were dissipated when WPL was still in control of BL. Therefore, there is no reason and/or requirement for the plaintiff to call the Liquidator to give evidence, as the said dissipation of the monies did not occur during the Liquidator's management of BL.

[42] Premised on the above facts, the LJC was correct in finding that having established that the monies were dissipated during WPL's control and management of BL, the plaintiff had satisfied its burden of proof, and the onus shifted to WPL to show that the monies were not dissipated wrongly, to support his defence as such, it is rightly found that it was WPL who should

have called the liquidator as a witness if he took the position that the liquidator was in possession of the material documents on the dissipation of the monies.

[43] Among the other important grounds raised in WPL's memorandum of appeal and submission is that BL did not owe a sum of RM5,907,500 to M/S Sulaiman & Taye. Related to this ground is WPL's defence that the said bill is grossly excessive and had not been proven to be reasonable and correct. On this point, the plaintiff's reply found favour with us that BL did have the opportunity and had indeed filed a petition to tax the plaintiff's bill. BL then, nevertheless, had ceded to challenge the said Bill when it chose not to proceed with the said taxation proceedings. Thereafter, the plaintiff had proceeded to file its proof of debt ('POD'), which was duly received and admitted.

[44] Having regard, essentially, to the foregoing, we held that the LJC's finding of fact on the core issue of intention to defraud creditors of the company (BL) by the appellant WPL was supported by the evidence and facts adverted to in the LJC's reasoning. Thus, the finding was clearly not shown to be incorrect, much less, plainly wrong to warrant any interference or variation by us.

[45] We will now proceed to explain our decision in respect of Appeal 980 when, as pointed out by the respondents, based on the plaintiff's MOA the main focus of the plaintiff's appeal is that the High Court had ordered the sum of RM5,907,500 to be paid to the liquidator of BL instead of the plaintiff directly. It was contended by the respondents that the LJC was right in principle to order that the debt allegedly due to the appellant was to be paid to the liquidator to prevent any 'under preference' to the plaintiff which would infringe s 528 of the CA 12016. Otherwise, it would purportedly render the rule of undue preference nugatory. For ease of reference, we reproduce s 528 of the CA 2016 as follows:

> Undue preference
>
> (1) Any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which is unable to pay its debts, as the debts become due, from its own money in favour of any creditor or any person in trust for any creditor shall be deemed to have given such creditor a *preference over other creditors* in the event of the company being wound up on a winding up petition presented within six months from the date of making or doing the same and every such act *shall be deemed fraudulent and void*. (Emphasis added)

[46] On the above premise, R2 took the position that the plaintiff ought not to be given any preference above other lawful creditors and as such, payment was correctly ordered to be made to the liquidator instead of the plaintiff.

A **[47]** We were not in agreement with R2's contention that the LJC had not erred in principle in ordering that the monies be paid out to the liquidator of BL as contribution to the assets of the company.

B **[48]** The contrary position taken by the appellant was in accord with our view on the issue at hand.

C **[49]** First and foremost, the appellant informed us that the LJC had requested for further submissions as to the issue whether or not the monies should be paid to the plaintiff herein or to the liquidator of BL before the judgment was pronounced. Secondly, it was pointed out to us that the positions in the United Kingdom (UK) under s 332(1) of the UK Companies Act and Malaysia pursuant to s 304 of the CA 1965 were similar. Both provisions allowed for not only the liquidator, but also any creditor or contributory to seek redress against the person who were knowingly parties to the fraud to be made personally liable.

D

E **[50]** As to the issue of whether or not such an order would have the effect of making any such applicant (the plaintiff in this case) a secured creditor with some preference to other creditors was then addressed by the UK via the Insolvency Act 1986. Section 213 of the UK Insolvency Act 1986.

F **[51]** An equivalent provision is not found in Malaysia which stipulates that only the liquidator is entitled to make such an application. On the contrary s 304 (now of our Companies Act expressly s 540) allows the liquidator, any creditor or any contributory to take such action.

G **[52]** Hence, in our opinion, it was erroneous for the LJC to have held that English decision on the interpretation of s 332(1) of the UK Companies Act 1948 are still relevant and useful in our consideration of s 304(1) of the CA 1965. It would be a correct view if CA 1965 was still the prevailing company law in our jurisdiction. As the governing company law presently in force in Malaysia is the CA 2016 which does not contain the restrictions as introduced by the UK Insolvency Act vide s 213, the legislative intent of the Malaysian

H Parliament was not for the same restriction to apply in Malaysia.

I **[53]** As rightly brought to our attention the English cases of *Re William C Leitch Bros, Ltd (No 2)* [1932] All ER Rep 897, *Re Cyona Distributors Ltd* [1967] 2 WLR 369 and *Re Esal (Commodities) Ltd, London and Overseas (Sugar) Co Ltd and another v Punjab National Bank* [1997] BCLC 705, as relied on by the LJC, were cases decided based on the previous English position under s 332 of the UK Companies Act 1948, which was then superceded by a change in the legislation by way of s 213 of the UK Insolvency Act 1986. However, our Parliament had chosen not to introduce the restrictive provisions

of the same type. Our apex court in *Dato' Prem Krishna Sahgal v Muniandy a/l Nadasan & Ors* [2018] 2 MLJ 693; [2017] 10 CLJ 385 had held that the director was to be personally liable and responsible to pay the employees (who were unsecured creditors) of the company, which had already been wound up (see also *JCT Ltd v Muniandy Nadasan & Ors and another appeal* [2016] 6 MLJ 635; [2016] 3 CLJ 692 (CA)).

[54] As such, on the law as it stands, an unsecured creditor such as the present plaintiff is entitled to obtain an order or judgment against directors personally pursuant to s 304 of the CA.

[55] In seeking to distinguish the facts of the COA case of *JCT Ltd* where the director of the company to be personally liable to the respondents, who were unsecured of creditors, the LJC opined that:

> However, the facts in that case are quite different. The court did not order the delinquent directors to pay other debts of the company apart from the particular debts claimed by the employees. Also, the employees claims in that case would have enjoyed a priority over the general creditors under s 292 of the CA 1965 and thus, would not have been shared *pari passu* with the general unsecured creditors.

[56] We agree with the appellant's contention that the LJC fell into error as to the classification of creditors as expressed in the *JCT* judgment. In that case, the judgment classified the creditors concerned as only unsecured creditors without any consideration regarding the rank of creditors or *pari passu* as mistakenly construed by the LJC. The right of a creditor to seek redress against the directors personally arose when the situation called for it depending on the circumstance of the particulars. We are inclined to hold that the circumstance of the instant case indeed called for personal liability against R2 as the director contrary to the finding of the LJC.

[57] We would hasten to add that as the plaintiff's pleaded case before this honorable court is also purely concerned with the plaintiff's own claims , it is not an action whereby the plaintiff herein is seeking to make WPK and WPL to be liable for any and/or all creditors' claims, including that of the Government of Malaysia against BL. Considering the plaintiff's pleaded cause of action, it was misconceived for the LJC to secure the payment for the GOM, a non-party to the action in disregard of the facts and principles in respect of the said cause of action under s 304(1) of the CA 1965 or s 540 of the CA 2016.

[58] Notwithstanding that the LJC stated that it was unfortunate that the liquidator was not made a party to the suit, we consider this to be an irrelevant and a non-issue in the resolution of the present suit, particularly in regard to the party entitled to be paid damages. More importantly, the LJC should have appreciated the following facts highlighted by the plaintiff:

(a) that the liquidator has been informed of the suit, and it was incumbent on the liquidator to have sought to intervene, if was deemed necessary; and

(b) meither s 304(1) of the CA 1965 nor s 540(1) of the CA 2016 stipulates that the liquidator must be made a party in situations where the company has been wound up.

[59] Rightly, having taken cognizance of the fact that the liquidator is not a party to the suit before the court, the LJC should have been even more wary in pronouncing its judgment for the monies to be paid to the liquidator.

[60] Lastly, we accept the plaintiff/appellant's proposition to be correct in law that the fact that both s 304 of the 1965 Act and s 540 of the 2016 Act does not limit the right of any creditor to initiate action against the persons responsible for the fraudulent trading, it therefore must not have been Parliament's intention to provide such a limitation. As decided by both the COA (*JCT*'s case) and affirmed by the Federal Court (*Dato' Prem*'s case), a creditor who remains an unsecured creditor would, nevertheless, retain the right to recover the debt directly from the directors personally if they are shown to have acted wrongfully, as in the instant case where there was ample evidence of R2 wrongful act in dissipating the company's assets fraudulently to deny the appellant from recovering their debt. We conclude on Appeal 980 that the LJC had erred in principle when he gave decision that the monies are to be paid to the liquidator as contribution to the company's assets.

CONCLUSION

[61] We pronounced the following decision, with broad grounds, in respect of both appeals:

(a) *Appeal 982*:

(i) we find that there is more than ample evidence to support the High Court's findings that the directors of the company had carried on business to defraud creditors;

(ii) in particular in this case, the company was in a position to pay the legal fees of the legal firm but the directors simply could not explain where the sum of RM70m had been paid out to. The court is entitled to make the necessary inference and finding, especially under s 106 of the Evidence Act, to arrive at the conclusion that the directors are personally liable for the amount claimed as the fact in issue was especially within their exclusive knowledge;

(iii) however, as the Inland Revenue Department ('IRD') is not a party to the suit, we are of the considered opinion that the High Court

had erred into venturing into the Inland Revenue's debt when IRD was not a plaintiff or a party before the court;

(iv) we therefore would set aside that part of the High Court's decision relating to the Inland Revenue Department's debt; and

(v) in other words, we allow the appeal of the appellant (director) in part and make each party bear its own costs here.

(b) next, as regards *Appeal 980*:

(i) we are of the considered view that in the circumstances of this case and based on the findings of fact by the High Court, the proper order should be an order for the payment of the legal fees of RM5,907,500 and interest as claimed direct to the appellant by the respondents jointly and severally. We do not think that such a payment would offend the priority of payment principle as the action was brought against the delinquent directors personally and not against the wound up company. It was also not brought by the liquidator; and

(ii) we would, therefore, allow the appeal and set aside that part of the order of the High Court appealed against with costs of RM20,000 to the appellant subject to allocator.

Order accordingly.

Reported by Nabilah Syahida Abdullah Salleh